

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

BETTY BARKER, :  
 :  
 Plaintiff, : Case No. 3:07cv174  
 :  
 vs. : JUDGE WALTER HERBERT RICE  
 :  
 COMMISSIONER OF SOCIAL SECURITY, :  
 :  
 Defendant. :

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DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS  
OF UNITED STATES MAGISTRATE JUDGE (DOC. #11) IN THEIR  
ENTIRETY; PLAINTIFF'S OBJECTIONS IN PART TO SAID JUDICIAL  
FILING (DOC. #12) OVERRULED; JUDGMENT TO BE ENTERED IN FAVOR  
OF PLAINTIFF AND AGAINST DEFENDANT COMMISSIONER, VACATING  
COMMISSIONER'S DECISION THAT PLAINTIFF WAS NOT DISABLED,  
AND, THEREFORE, NOT ENTITLED TO BENEFITS UNDER THE SOCIAL  
SECURITY ACT, AND REMANDING THE CAPTIONED CAUSE TO THE  
DEFENDANT COMMISSIONER, PURSUANT TO SENTENCE FOUR OF 42  
U.S.C. § 405(g), FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS  
OPINION AND THE MAGISTRATE JUDGE'S REPORT AND  
RECOMMENDATIONS; TERMINATION ENTRY

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Plaintiff has brought this action pursuant to 42 U.S.C. § 405(g) to review a  
decision of the Defendant Commissioner denying Plaintiff's application for Social  
Security disability benefits. On July 17, 2008, the United States Magistrate Judge  
filed a Report and Recommendations (Doc. #11), recommending that the  
Commissioner's decision that Plaintiff was not disabled and, therefore, not entitled

to benefits under the Social Security Act be vacated; that no finding be made as to whether Plaintiff was under a "disability" within the meaning of the Social Security Act during the period of time at issue; and remanding the captioned cause to the Defendant Commissioner and the Administrative Law Judge, pursuant to Sentence Four of 42 U.S.C. § 405(g), for further consideration consistent with the Magistrate Judge's Report and Recommendations. Based upon reasoning and citations of authority set forth in the Magistrate Judge's Report and Recommendations (Doc. #11), as well as upon a thorough de novo review of this Court's file, including the Administrative Transcript (filed with Defendant's Answer at Doc. #5), and a thorough review of the applicable law, this Court adopts the aforesaid Report and Recommendations in their entirety and, in so doing, orders the entry of judgment in favor of the Plaintiff and against the Defendant Commissioner, concluding that the Commissioner's decision that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act was not supported by substantial evidence; vacating the Commissioner's finding of non-disability; making no finding as to whether Plaintiff was under a disability within the meaning of the Social Security Act during the relevant period of time at issue; and remanding the captioned cause to the Defendant Commissioner and the Administrative Law Judge, pursuant to Sentence Four of 42 U.S.C. § 405(g), for further consideration consistent with the Magistrate Judge's Report and Recommendations and this Opinion. The Plaintiff's Objections in part to said judicial filing (Doc. #12, seeking a remand for the payment

of benefits) are overruled. Accordingly, the decision of the Defendant Commissioner that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act is vacated.

In reviewing the Commissioner's decision, the Magistrate's task is to determine if that decision is supported by "substantial evidence." 42 U.S.C. § 405(g). Under 28 U.S.C. § 636(b)(1)(C), this Court, upon objections being made to the Magistrate Judge's Report and Recommendations, is required to make a de novo review of those recommendations of the report to which objection is made. This de novo review, in turn, requires this Court to re-examine all the relevant evidence, previously reviewed by the Magistrate, to determine whether the findings of the Secretary [now Commissioner] are supported by "substantial evidence." Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1053 (6th Cir. 1983); Gibson v. Secretary of Health, Education and Welfare, 678 F.2d 653, 654 (6th Cir. 1982). This Court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decision. The Commissioner's findings must be affirmed if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971), citing Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938); Landsaw v. Secretary of Health and Human Services, 803 F.2d 211, 213 (6th Cir. 1986). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion. Richardson, supra, at 401; Ellis v. Schweicker, 739 F.2d 245, 248 (6th Cir. 1984). Substantial evidence is more than a mere scintilla, but only so much as would be required to prevent a directed verdict (now judgment as a matter of law) against the Commissioner if this case were being tried to a jury. Foster v. Bowen, 853 F.2d 483, 486 (6th Cir. 1988); NLRB v. Columbian Enameling and Stamping Company, 306 U.S. 292, 300 (1939). To be substantial, the evidence “must do more than create a suspicion of the existence of the fact to be established... [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” LeMaster v. Secretary of Health and Human Services, 802 F.2d 839, 840 (6th Cir. 1986), quoting NLRB v. Columbian Enameling and Stamping Company, supra.

In determining whether the Commissioner’s findings are supported by substantial evidence, the Court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978); Ellis, supra; Kirk v. Secretary of Health and Human Services, 667 F.2d 524, 536 (6th Cir. 1981); Houston v. Secretary of Health and Human Services, 736 F.2d 365 (6th Cir. 1984); Garner v. Heckler, 745 F.2d 383 (6th Cir. 1984). However, the Court may not try the case de novo, resolve conflicts in evidence or decide questions of credibility. Garner, supra. The findings of the Commissioner of Social Security and proceedings on Claimant’s application for social security disability benefits are not subject to reversal merely because there exists in the record substantial evidence to support a different

conclusion. Buxton v. Halter, Commissioner of Social Security, 246 F.3d 762 (6th Cir. 2001). If the Commissioner's decision is supported by substantial evidence, it must be affirmed, even if the Court as a trier of fact would have arrived at a different conclusion. Elkins v. Secretary of Health and Human Services, 658 F.2d 437, 439 (6th Cir. 1981).

In addition to the foregoing, in ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. While agreeing with the Magistrate Judge that the Commissioner's decision of non-disability must be vacated, given that same is not supported by substantial evidence, it further agrees with the Magistrate Judge that remand for further consideration and proceedings is required, rather than a remand for the payment of benefits. Given the evidentiary conflict between the opinions of Dr. Boyce, on the one hand, and those of Drs. Rodney, Fritzhand and Murphy, on the other, which has not been administratively resolved under the standards required by the Regulations, it is clear that the Defendant Commissioner has failed to follow the Regulations of the Social Security Administration and, further, that this Court cannot say, at this time, that the evidence of Plaintiff's disability during the relevant time period is overwhelming and/or evidence of a disability is strong, while contrary evidence is weak.

WHEREFORE, based upon the aforesaid, this Court adopts the Report and Recommendations of the United States Magistrate Judge (Doc. #11) in their entirety, having concluded that the Commissioner's decision that Plaintiff was not disabled and, therefore, not entitled to benefits under the Social Security Act was not supported by substantial evidence. Plaintiff's Objections to said judicial filing in part (Doc. #12, to the extent she seeks a remand for the payment of benefits, rather than one for further proceedings) are overruled. Judgment will be ordered entered in favor of the Plaintiff and against the Defendant Commissioner, vacating the Commissioner's finding that Plaintiff was not disabled and therefore, not entitled to benefits under the Social Security Act; making no finding as to whether Plaintiff was under a disability within the meaning of the Social Security Act during the period of time at issue; and remanding the captioned cause to the Defendant Commissioner and the Administrative Law Judge, under Sentence Four of 42 U.S.C. § 405(g), for further considerations consistent with the Magistrate Judge's Report and Recommendations, which this Court has adopted in its entirety in this opinion, to wit: to re-evaluate the medical source opinions under the legal criteria set forth in the Commissioner's Regulations, Rulings and as required by case law; to explain the evaluation of the medical sources as required by the Regulations, Rulings and case law; and to determine anew whether Plaintiff was under a "disability" during the period of time beginning on the date of her claimed disability onset (December 7, 2001) to July (not the 1st), 2004.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

September 29, 2008

/s/ Walter Herbert Rice  
WALTER HERBERT RICE, JUDGE  
UNITED STATES DISTRICT COURT

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